

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DARCIUS LAMONTE BUTLER, et al.,

Defendants and Appellants.

H025033

(Santa Clara County

Super. Ct. No. CC121274)

In an amended information filed on June 10, 2002,¹ the Santa Clara County District attorney charged appellants Darcus Butler (hereinafter Butler) and Ben Martin (hereinafter Martin), along with co-defendant Karla Page, with first degree burglary of an inhabited dwelling in concert (Pen. Code, § 213, subd. (a)(1)(A), count one)² and three counts of felony false imprisonment (§§ 236, 237, counts two, three and four). In addition, the information charged Martin with attempted murder (§§ 664, 187, count five) and assault with a firearm (§ 245, subd. (a)(2), count six).³

¹ The amended information contains two filing dates: June 10, 2002, and June 12, 2002.

² All section references are to the Penal Code unless otherwise noted.

³ Until just before the prosecutor's opening statement, all three defendants were charged with attempted murder. In addition, premeditation was alleged against Butler.

With respect to count one, the information alleged that Butler and Martin personally used a firearm within the meaning of section 12022.53, subdivision (b) and Martin intentionally and personally discharged a firearm within the meaning of section 12022.53, subdivision (c). With respect to counts two through four, the information alleged that Butler and Martin personally used a firearm within the meaning of section 12022.5 subdivision (a)(1). With respect to count five, the information alleged that Martin intentionally and personally used a firearm within the meaning of section 12022.53, subdivision (c).

Further, it was alleged that Butler had suffered a prior conviction within the meaning of section 667.5, subdivision (b).

Following a jury trial, Martin and Butler were found guilty on all counts and the allegations were found true.⁴

On September 13, 2002, the court sentenced Martin to 36 years to life consisting of the following: a life term on count five; 20 years for personal discharge of a firearm in the commission of that offense; six years on count one; and 10 years for personal use of a firearm in the commission of that offense. Terms on the remaining counts and allegations were stayed pursuant to section 654. Count six was dismissed as an alternative charge. Butler was sentenced to a total term of 17 years.

Butler filed a notice of appeal on September 13, 2002. On October 8, 2002, Martin filed his notice of appeal.

On appeal, Butler raises two issues. First, he contends that the "prosecutor committed multiple acts of misconduct which effectively denied [him] due process of law." Second, the court abused its discretion by failing to exclude evidence that he and Thomas Butler were brothers.

Ultimately, only Martin was charged with attempted murder, including the allegation of premeditation and deliberation.

⁴ Butler admitted the prior conviction allegation.

Martin raises nine issues. First, he contends that his conviction for premeditated and deliberate murder is unsupported by substantial evidence. Second, the trial court erred in determining that he did not make a prima facie showing of *Wheeler/Batson* error, following his objections to the prosecutor's peremptory challenges during the jury voir dire. Third, the court erred in instructing on implied malice in an attempted murder case. Fourth, the court erred in failing to give a modified version of CALJIC No. 8.72 specifying that the jury must acquit of murder if it has a reasonable doubt whether the offense committed was murder or manslaughter. Fifth, the court erred in failing to give any instruction like CALJIC 5.15 that specified it was the prosecution's burden of proof to demonstrate the unlawfulness of the attempted homicide. Sixth, the court erred in failing to rule on the sufficiency of the evidence claim asserted in his section 1181 motion. Seventh, imposition of a "true life term" constitutes cruel and unusual punishment in violation of the California Constitution and United States Constitution. Eighth, the cumulative effect of all these errors deprived him of due process of law and a fair trial, which requires reversal of the judgment. Finally, Martin joins all arguments raised by Butler to the extent that they apply to him.

For the reasons outlined in this opinion we will reverse the judgment of conviction with respect to Butler. With respect to Martin, the judgment is affirmed.

Facts

Testifying under a grant of immunity, Vanessa Sousa (hereinafter Sousa), stated that during the day on August 13, 2001, Karla Page (hereinafter Page) called her at work and offered her \$100 to drive her from Suisun to San Jose that night. Sousa drove to Suisun to pick up Page. Martin was there. He and Page were in a relationship and had a child together.

Martin told Sousa to "drop him off " at a Jack-in-the-Box restaurant to meet his cousin. When they got to the restaurant, Martin got into a green four-door car (hereinafter the green car). The driver of the car (hereinafter the driver) was a tall, slim-

faced, African-American man. The man's hair was short and he was wearing dark clothes. Sousa was not introduced to this man. She did not really pay attention to him. Sousa and Page drove to the house of Page's mother in Richmond, where they dropped off Page's children. Martin and the driver were there in the green car. Sousa and Page followed the green car to a "condo" where Martin told Sousa to "pop the trunk." Martin put something into the trunk. Sousa did not see what it was.

Sousa accompanied by Page, and Martin accompanied by the driver, went in separate cars to Oakland. Martin and the driver went into a liquor store. When they came out a third man was with them. This man was short and stocky and wore a beanie. He may have had braided hair. He got into the green car with Martin and the driver. They all drove to San Jose.

Page told Sousa where to go. When they got off the freeway, they went to a commercial area where Martin asked Sousa to open the trunk again. Then, Page told her to drive around the corner. This was a residential area. The other car followed them. Page told Sousa that they were going to meet her friend, who was some "big timer" in San Jose.

When they got to the friend's house, Page said that the friend was not home. She told Sousa to park around the corner from the house. According to Sousa, Page "paged the guy that [they] were supposed to meet. She page[d] him to [Sousa's] cell phone." She referred to the friend as Doug. Page called Martin to let him know that Doug was not there.

Page and Sousa stayed at the corner down the street from the house. Subsequently, Sousa saw two cars come by. One car was black, possibly with tinted windows, the other was a red Suburban. Page said, "That's him." A few minutes later, Sousa saw the black car race past them, chasing the green car. Sousa began asking Page questions. It was then that she learned that the plan was that Martin, and the people that

were with him, were supposed to go through the friend's room while she and Page were in the front of the house speaking with him.

A while after the cars sped by, Martin called to say that he was by a church and needed them to "come by and pick him up." Eventually, Page and Sousa found the church. Martin was about a block away from the church. He was on the sidewalk by some bushes and trees. Martin got into the car and they went around the corner. Martin got something out of the bushes. Sousa did not see what it was.

Page, Sousa and Martin drove up and down the street looking for the other two men. They found the person that Martin called his cousin. At Martin's direction, Sousa moved the green car to a more secluded residential area. Finally, they located the third man. They returned to the green car. Martin and Page got into the car, leaving Sousa with the other two men. The man with the braided hair was in the back seat and the other man rode in the front. Just outside of San Jose, Page and Martin got back into Sousa's car. Sousa drove Page and Martin all the way back to Richmond. Sousa recalled that Martin told her that he had put guns in her car. Martin mentioned that shots were fired.⁵

On August 13, 2001, Lisa S., her daughter Brittaney (then 12 years old), her adult son Douglas Wallace and his girlfriend Ann, lived on Annapolis Way in San Jose. Wallace had dated Page in the past, but had not spoken to her in almost a year. Previously, Page had been to Wallace's house and she had seen that he had large amounts of money. In addition, she knew that he had marijuana. On August 13, 2001, Page called Wallace at 4 or 5 p.m. and asked if he had any marijuana. Later that night she paged him.

At about 10 p.m. on August 13, Lisa was at home with Brittaney and Brittaney's nine-year-old friend Christina. Brittaney and Christina answered a knock at the front door. At the door was a man Brittaney identified at trial as Martin. She could see that he

⁵ Initially, Sousa agreed with the district attorney when he asked her if Martin had said that he had fired shots. On cross-examination, after listening to her taped statement, Sousa admitted that Martin said shots were fired.

was holding a gun behind his back. She could see part of it sticking out. Martin asked whether Doug was at home. When Brittany did not reply, Martin pulled out the gun and told the girls to get down. Brittany and Christina ran to Lisa, who was working at a computer in a bedroom. Christina ran into the closet in the bedroom.

Lisa stood up when the girls entered the room. She saw two men with guns walking in the hallway. In court, she identified the first man as Butler and the other man as Martin. Martin walked by the door to the bedroom, looked in, and continued into the next bedroom, which belonged to Wallace. Butler stayed in the room with Lisa, Brittany and Christina. They all heard Wallace's room being ransacked. Butler held a gun on them and would not allow them to leave the room. Butler told them to be calm and he would not hurt them.

When Martin finished searching Wallace's room, the two men left the house by the front door. Lisa followed to see in which direction they would go. As the men left the house, Wallace, Ann, and an uncle, Rob Guiliano, returned home after getting Wallace's car from a repair shop. Wallace saw a "[B]lack male" and a "Hispanic male" walk from the house. In court, he identified Butler and Martin as the two men he saw on the driveway.

Wallace walked up the driveway and came face to face with Martin and Butler. Martin raised his gun and asked whether Wallace was "Doug or Ryan."⁶ Wallace retreated, backing away from the driveway. The two men kept walking toward him. Martin pointed his gun at Ann and Guiliano. According to Wallace, Butler did not point his gun at anyone.

⁶ Ryan Hisatomi was Wallace's best friend. He testified at trial that several days before this incident, Martin and Page had visited him asking questions about whether Wallace had marijuana.

Martin and Butler walked down the sidewalk to a car parked in front of a neighbor's house. They entered the rear of the car, which Wallace thought was a green Nissan or Corolla. A "Black" male was already in the car. The car drove away.

Lisa came out of the house screaming that the men had robbed them and that Wallace should get the license plate number of the car. Immediately, Wallace got into his car, a black Honda, and pursued the green car.

On Meridian Street, Wallace overtook the green car and pulled alongside. He yelled at the men in the green car and asked them who they were. Martin, sitting in the rear of the car behind the driver, pointed his gun at Wallace causing him to brake. Wallace continued to pursue the car. He saw that the driver was a "Black male," 25 years old or less, with short hair. Butler was in the middle of the rear seat. He did not point a gun at Wallace.

Wallace continued to follow the green car when it turned into a residential area. The car pulled over and its lights went out. Wallace flashed his lights at the car and continued to yell. The lights came back on in the green car and it made a U-turn. The car came towards Wallace.

After Wallace wrote down the license plate number of the green car he continued to chase it. Once again the car pulled over to the curb and the lights went out. Wallace honked the horn of his car, yelled, and kept his lights on high beam. After about 20 seconds, the green car's lights came back on and the car drove away. Wallace continued to pursue the car and confirmed that he had the correct license plate number by driving close enough to read it. After making several turns, the green car pulled to the curb once again and stopped about three houses in on a side street. Without turning on to this side street, Wallace stopped his car at an angle in the middle of the road. This time, Wallace got out of his car. Leaving the door open, he started yelling at the occupants of the green car over the roof of his car. He was not armed.

Martin got out of the back seat of the green car. Wallace asked him if he was going to shoot him. Martin started walking towards the middle of the street and started firing at Wallace. Wallace ducked down behind his car, got inside while "laying low." Wallace heard three shots. One bullet impacted the passenger door of Wallace's car as Wallace was trying to put the car in drive. He heard the glass break on the windshield. A house located nearby, behind Wallace's car, sustained bullet strikes. Wallace drove off in the direction that his car was facing. He looked in his rearview mirror and saw the green car driving away in the opposite direction.

At trial, it was stipulated that the distance between Wallace and where Martin stood was 114 feet. Six .45-caliber casings were found in the same area.⁷ Wallace testified that the spread pattern of the casings reflected Martin's movement as he was shooting. Several people that lived in the area testified that they heard yelling. Almost all of them described hearing three, four or five shots coming in rapid succession. One person recalled hearing more than one person yelling before the shots. The tapes of several 911 calls were played for the jury. One witness thought that a couple of the shots he heard came from different locations, one much closer to his house.

Around the time of the offense, Page and Martin were staying with Arthur Pompa. Pompa recalled that Martin asked him to get rid of a small safe after Page was arrested. He turned the safe over to the police. Among the items found in the safe, Wallace identified a fake Rolex watch as his. After the robbery, Wallace's friend Ryan Hisatomi overheard Page admit that she told Martin to look for money in Wallace's drawers; that she was down the street while the robbery was occurring; and that two Rolex watches and a ring were taken from Wallace's house.

⁷ A property report in the case mentioned a .40-caliber round recovered at the same intersection. This live .40-caliber round was found by a neighbor in the intersection within a day or two of the incident. In addition, the neighbor found a live .45-caliber round in the intersection. No .40-caliber casings were found.

At trial, the prosecution introduced the testimony of Latanya Haley Butler. Latanya Butler testified that she was married to Thomas Butler and that she was Martin's cousin. Further, Thomas Butler had access to a green Mitsubishi car, which had been loaned to her from July 24, 2001 through August 18, 2001. Latanya stated that the defendant Darcus Butler was Thomas Butler's brother.

Defense Case

The defense contended that the victims misidentified Butler. Butler's mother and sisters presented alibi and physical appearance evidence to support that contention.

Butler's sister Lameshia testified that Butler was living at her house in Oakland on August 13, 2001. Butler did not leave the house that night. He was at home with his four children and her son.

Butler's mother Patricia testified that as of July 19, 2001, Butler had matted hair, which looked like a "bird nest." At the end of July or the first part of August, Butler's hair was cut to about two inches in length with no braiding or nesting. On August 13, when she saw Butler, his hair looked cut.

Another of Butler's sisters, Diana, testified that she had seen Butler with twisted thick "dreads," but that at the end of July he had his hair cut "real low."

All three testified that Butler "did not get along" or socialize with his brother Thomas.

Rebuttal Evidence

Wallace's girlfriend Ann Stangel identified Butler as the man that pointed a gun at her in the driveway. She could not positively identify Martin. She had dated Wallace for years, but never saw him with a gun.

Discussion

Defendant Butler's Contentions

Butler contends that the prosecutor committed "multiple acts of misconduct which effectively denied [him] due process of law."

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State. . . . Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820; *People v. Hill* (1998) 17 Cal.4th 800, 819-820.)

"Improper remarks by a prosecutor can 'so infect[] the trial with unfairness as to make the resulting conviction a denial of [federal] due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 2471, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 1871, 40 L.Ed.2d 431]; cf. *People v. Hill* (1998) 17 Cal.4th 800, 819 [72 Cal.Rptr.2d 656, 952 P.2d 673].) Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct, even if such action does not render the trial fundamentally unfair. [Citations]" (*People v. Frye* (1998) 18 Cal.4th 894, 969.) On the other hand, a prosecutor has "wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Hill, supra*, 17 Cal.4th at p. 819.)

With this in mind we turn to the specific acts that Butler claims amount to misconduct.

Butler's Parole Status

During in limine motions, Butler's counsel contended that if Butler did not testify the jury should not learn that he had a parole agent. The prosecutor represented to the court that he would use the parole agent's testimony regarding Butler's appearance "in a sanitized way if we can present he's a person who has regular contact with the defendant."

The issue arose again in discussions of in limine motions with regard to a possible identification of Butler made at a parole hearing. The court stated to the prosecutor, "I take it, Mr. Slone, that you can admonish your witness to sanitize that in such a way that the parole is left out of the occasion of the hearing." The prosecutor agreed. The court asked Butler's counsel if that was satisfactory. Counsel replied that he trusted that the prosecutor would "use his best efforts with [Lisa]. I've seen her in action your Honor."

The court went on to state the following: "Well, I think this issue is important enough and there may be other witnesses who might be inclined either voluntarily or through some degree of spite to mention parole. And I'll order all attorneys to admonish their witnesses and also in their examination of witnesses to avoid the mention of parole. I['m] not sure we can go any further than that. [¶] Let me broaden that just a bit to include any prior arrests or convictions of Mr. Butler in the event he doesn't testify. Not just parole. It's the criminal history in the event he doesn't testify."

During cross-examination of Detective Gutierrez, Butler's counsel asked him the following question: "When you talked to Darcus Butler about his hair, you knew it had been cut for a couple [of] months by the time you were talking to him, correct?" Detective Gutierrez replied: "I spoke with his parole agent."

Immediately, Butler's counsel asked to approach the bench. An off-the-record discussion occurred. Later counsel made a record of the discussions in which he contended that Detective Gutierrez's answer was non-responsive and "in clear violation of the Court's order to the prosecutor to ensure that no prosecution witness refer to any parole officer, parole status, prior conviction as to Mr. Butler." Butler's counsel noted that the issue of a mistrial had been discussed at sidebar and requested that matter be deferred until the jury came back with a verdict.

The court stated that it was prepared to rule on the motion for a mistrial. The court addressed Butler's counsel as follows: "It appears to the Court if the Court were to grant the mistrial motion at this time, it would not be necessary to strike the response from the

record; however, if the Court were to deny the mistrial motion, you would like the Court to admonish the jury to ignore the remark."

Butler's counsel replied: "See, that's one of those dangers, to admonish them means you have to bring it back to their attention, which is the two-edged sword on these. It would definitely have to be stricken. That's the danger. No matter what I ask, I will bring it back to their attention."

Butler's counsel pointed out that Gutierrez's testimony was prejudicial in that it revealed to the jury that Butler had been convicted of a crime. The prosecutor argued at length that there was no impropriety on his part. Furthermore, he contended that Officer Gutierrez's testimony was not unduly prejudicial.

The court denied the mistrial motion. The court proposed striking Detective Gutierrez's testimony with the admonition to the jury that the court was "striking the reference by Officer Gutierrez of where he heard about Mr. Butler's hair length prior to meeting Mr. Butler, and for the jury to disregard that reference." The admonition was given shortly before closing argument.⁸

During closing argument, the prosecutor referred to an Agent Houston as being the source of information concerning the length of Butler's hair. Immediately, Butler's counsel asked to approach the bench. Later the court made a record of the bench conference. The court noted that Butler's counsel had asked to approach the bench on hearing the prosecutor refer to Agent Houston. The court stated that it had admonished the prosecutor not to refer to Houston in that manner and had denied defense counsel's

⁸ The court admonished the jury as follows: "I also want to strike some evidence from the record. When Officer Gutierrez was testifying, he was asked a question about whether he had information about Mr. Butler's hair length or style prior to the time he first met Mr. Butler. And Detective Gutierrez's answer to the question is stricken at this time. The jury is instructed to disregard his answer, how he heard about Mr. Butler's hair length or style prior to [the] time that he first met Mr. Butler."

motion for a new trial. Following further argument on the matter, the court reiterated that the motion for a mistrial had been denied.

Butler contends that by failing to sufficiently warn Detective Gutierrez not to mention Butler's parole status, the prosecutor permitted Gutierrez to inject damaging evidence into the record in direct contravention of the court's order. Thus, this was misconduct.⁹

The People contend that prosecutorial misconduct has not been established. Instead, the issue is whether the witness's statement was incurably prejudicial requiring a mistrial.

After an extensive review of the record, we agree with the People's characterization of the issue before us. Accordingly, we exam the issue in this light.

We emphasize that a trial court's ruling denying a motion for mistrial is reviewed under the deferential abuse-of-discretion standard. (*People v. McLain* (1988) 46 Cal.3d 97, 113.)

"There is little doubt exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial. (See, e.g. *People v. Price* (1991) 1 Cal.4th 324, 431 . . . [evidence defendant could not remember dates as he had been in prison so long should have been excluded as more prejudicial than probative]; *People v. Bracamonte* (1981) 119 Cal.App.3d 644, 650-651 . . . [limiting instructions insufficient to overcome prejudicial effects of trying issue of guilt with truth of prior conviction allegations]; *People v. Morgan* (1978) 87 Cal.App.3d 59, 76 . . . [evidence of defendant's prior criminality 'obviously of a prejudicial nature']; *People v. Cabrellis* (1967) 251 Cal.App.2d 681 . . . [admission of evidence of other

⁹ Initially, the Attorney General argues that Butler's assertion that the prosecutor failed to admonish Detective Gutierrez not to mention the parole agent is pure speculation. We note that Butler is not arguing that the prosecutor failed to admonish Detective Gutierrez, rather that any warning that was given was insufficient.

crimes when offered solely to prove defendant's bad character reversible error especially when forces defendant to give up constitutionally protected right not to have to testify in own defense].)" (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580-1581.)

Furthermore, courts have found reversible error where a defendant was called an "ex-convict." (*People v. Ozuna* (1963) 213 Cal.App.2d 338, 342), and when a witness stated that a defendant "did time" in San Quentin. (*People v. Figuieredo* (1955) 130 Cal.App.2d 498, 505-506.) In *People v. Stinson* (1963) 214 Cal.App.2d 476, the court held that reference to a defendant's parole status by a police officer was improper because of its inevitable implication of a prior criminal record. This implication created the "possible tendency on the part of some jurors to convict a defendant not on proof that he committed the offense but because he has a criminal past." (*Id.* at p. 480.)

Although most cases involve prosecutorial misconduct as the basis for a motion for a mistrial, "a witness's volunteered statement can also provide the basis for a finding of incurable prejudice." (*People v. Harris, supra*, 22 Cal.App.4th at p. 1581 (*Harris*).)

"Whether in a given case the erroneous admission of such evidence warrants granting a mistrial or whether the error can be cured by striking the testimony and admonishing the jury rests in the sound discretion of the trial court. [Citation.]" (*Harris, supra*, 22 Cal.App.4th at p. 1581.) " 'A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. [Citations.] It is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." [Citation.]' " (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.)

"The finding of exceptional circumstances depends upon the facts in each case. 'An improper reference to a prior conviction may be grounds for reversal in itself [citations] but is nonprejudicial "in the light of a record which points convincingly to guilt" ' [Citation.]" (*People v. Allen* (1978) 77 Cal.App.3d 924, 935.)

Ultimately, here, the question is whether it is reasonably probable that the jury would have reached a result more favorable to defendant had it not heard evidence of Butler's parole status. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Allen*, *supra*, 77 Cal.App.3d at p. 935; *People v. Harris*, *supra*, 22 Cal.App.4th at p. 1581.)

The People argue that there was strong evidence that Butler "was a perpetrator. Lisa . . . identified Butler as a perpetrator at a photographic lineup held not long after the offense was committed." In addition, "[a]ll the other victims also identified Butler as a perpetrator, both in court and at a hearing three months after the incident. The getaway car was rented by Butler's sister-in-law, and his brother had access to the car. Sousa testified that they went to Oakland to pick up the third person; Butler lived in Oakland." Thus, "the single brief reference to 'parole agent' was not significant in the context of the entire guilt trial, and defendant's chances of receiving a fair trial was not irreparably damaged."

"There is a reasonable probability of a more favorable result within the meaning of *Watson* when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.' [Citation.]" (*People v. Mower* (2002) 28 Cal.4th 457, 484.) Such an equal balance of reasonable probabilities exists in the present case. The most critical fact to be determined by the jury was the identity of the African-American male intruder. An examination of the record shows that the jury had to make a determination of Butler's guilt based on the credibility of the prosecution's witnesses balanced against the credibility of Butler's alibi and physical appearance witnesses.

A close reading of the record reveals that, initially, all the victims were unable to identify Butler as the African-American male that took part in the robbery. Only Lisa, when shown a photographic lineup "thought" the photograph of Butler "looked like" the man that came into the bedroom. Furthermore, the jury requested two read backs of testimony given by defense witnesses Patricia Butler, Diane Butler and Lameshia Butler.

These witnesses testified exclusively as to evidence tending to show that Butler had been misidentified. Juror requests to have testimony reread indicate the deliberations were close. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295.) Moreover, the jury deliberated for nearly three days before reaching a verdict. Our Supreme Court has suggested that jury deliberations of almost six hours are an indication that the issue of guilt is not " 'open and shut' " and strongly suggest that errors in the admission of evidence are prejudicial. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907.) Here, the jury deliberated three times that long indicating that this was a close case.

Our review of the evidence and the deliberations of the jury convince us that the injection into the proceedings of Butler's parole status was not harmless. Accordingly, we conclude that it is reasonably probable that a result more favorable to Butler would have been reached had the prejudicial information not been divulged.

Since we have determined that Butler's case was irreparably damaged by Detective Gutierrez's reference to Butler's parole agent and because his case must be reversed we need not address Butler's contentions that numerous other instances of prosecutorial misconduct denied him due process of law. Nor do we need to address Butler's contention that the trial court abused its discretion by failing to exclude evidence that he and Thomas Butler were brothers.

Defendant Martin's Contentions

Evidence of Premeditation and Deliberation

Martin contends that the evidence presented at trial did not sufficiently establish premeditation and deliberation for the attempted murder charge. He argues that the prosecution "did not demonstrate beyond a reasonable doubt that this shooting was 'the result of careful thought and weighing of considerations.' "

We apply familiar principles in reviewing the sufficiency of the evidence to support a verdict. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "Like first degree murder, attempted first degree murder requires a finding of premeditation and

deliberation. . . . '[T]he test on appeal is whether a rational trier of fact could have found premeditation and deliberation beyond a reasonable doubt based upon the evidence presented.' . . . The three categories of evidence for a reviewing court to consider with respect to premeditation and deliberation are: (1) prior planning activity; (2) motive; and (3) the manner of killing. . . . 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly" [Citations.]'" (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223-1224, fns. omitted.)

Thus, "[e]vidence concerning motive, planning, and the manner of killing are pertinent to the determination of premeditation and deliberation, but these factors are not exclusive nor are they invariably determinative. [Citation.]" (*People v. Silva* (2001) 25 Cal.4th 345, 368.)

In determining the presence of substantial evidence, we " 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citations.]" (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) "Evidence, to be 'substantial' must be 'of ponderable legal significance . . . reasonable in nature, credible, and of solid value.' [Citations.]" (*Id.* at p. 576.)

"In reviewing the evidence on appeal, the applicable test is not whether guilt has been proven beyond a reasonable doubt, but rather whether substantial evidence supports the conclusion of the trier of fact. [Citations.] The reviewing court does not perform the function of reweighing the evidence; instead, the court must draw all inferences in support of the verdict that can reasonably be deduced from the evidence. [Citation.]" (*People v. Culver* (1973) 10 Cal.3d 542, 548.)

With the above standard of review in mind, we review the evidence to determine whether there existed sufficient evidence in the record that Martin premeditated and deliberated before he shot at Wallace.

The People assert that there was evidence of a motive for Martin to attempt to kill Wallace. Wallace came home just as Martin was leaving the house and came face to face with him. Martin could reasonably be concerned that Wallace could identify him. Since Wallace followed the green car for a substantial period, the jury could reasonably have found that Martin suspected that Wallace knew the license plate number. Moreover, Wallace was not giving up on the chase. The longer the suspects were being chased by Wallace, the greater the chance that the police would confront them either incidentally or because of someone at the house or Wallace called the police.

In addition, the People argue that the manner of the shooting supported a finding of premeditation and deliberation. Although Wallace followed the green car for some time, Martin did not shoot until Wallace got out of his car. Whereupon he fired six shots directly at Wallace, hitting his car.

We agree with the People that when viewed in the light most favorable to the verdict, the evidence of motive and the manner of the attempted killing support a finding of premeditation and deliberation.

Accordingly, we reject Martin's claim that there was insufficient evidence of premeditation and deliberation.

Wheeler/Batson Error

Martin contends that the court erred in determining that he did not make a prima facia showing of *Wheeler/ Batson* error following his objections to the prosecutor's exercise of peremptory challenges during jury voir dire.

Jury voir dire was conducted on May 29 and May 30, 2002. The first group of potential jurors to be called into the jury box included prospective juror 18, who became Juror 1 in the box and prospective juror 26, who became Juror 2 in the box.

Juror 1's husband had been charged with "drunk driving" five years earlier. Juror 1 believed that he had been treated fairly. Juror 2's son-in-law had been to prison for eight years for attempted murder. Although she did not attend the trial, she had talked to her daughter about what had happened. Juror 2 believed that the police, the district attorney, the jury and the judge had treated her son-in-law unfairly. She asserted that if she had the finances to hire a lawyer, rather than the public defender, he "might have gotten a better deal." Nevertheless, she agreed that she could set that aside and be fair and impartial to both sides in deciding the case.

Later, the prosecutor questioned Juror 2 about her son-in-law's conviction. He noted that he had been convicted of a charge similar to one of the charges involved in the case. Juror 2 claimed that it would not be a problem. She explained that she had been affected by her daughter's frustration in trying to get information about what was happening in her son-in-law's case. Juror 2 was sad because her grandson did not have his father, but felt that "justice was served."

When asked if her daughter's feelings had become her feelings because she had only been exposed to that side of the story, Juror 2 replied: "No more than the feelings I would have from hearing other people talk about different situations that go on in the courts. Everybody has an opinion. [¶] The main thing in my family or my neighborhood or the people I associate with would be people of color and on the equity or inequity in the court situation I hear about, so as much as I would be affected, as much as I was affected with my daughter. It was more a personal thing, my feelings for her than what was going on in the court. I never went."

When asked if the community sentiment would have "a carry-over effect in the trial," Juror 2 responded: "This is the only system that we have. So I'm dealing with that. As a person I try to keep myself in a position where those kinds of things don't happen to me. I don't have control over what other people do and I don't judge because I'm not in a

position to judge whether it's right or wrong. I basically care about just what happens to me and mine."

Then, the prosecutor asked about a statement Juror 2 had made that she wanted to be on the jury to ensure that things were fair. Juror 2 replied: "I will see that things are fair. Then maybe those things I hear in the community or on the news or in the paper or whatever you're at, it's not like this is not, I am not the only person who has heard that. I would like to see the process and know."

The prosecutor observed that Juror 1 was nodding her head when Juror 2 stated that she wanted to be on the jury to make sure the trial was fair. When questioned, Juror 1 stated that she agreed with Juror 2 "about some of the things that have happened with minorities," but she was there to see the process for herself. She stated that she could be fair.

Juror 1 acknowledged that she had been exposed to similar experiences where people have complained that they were treated unfairly, although she could not say on how many occasions this had occurred. She noted that she was there to "deal with the process, see it for [her]self." Juror 1 maintained that she did not have a "predisposition" because an "African-American" was charged. Nor was there anything in her "life experiences" that would prevent her from being fair and impartial.

The prosecutor exercised his first peremptory challenge to remove Juror 2. Butler's defense attorney asked to approach the bench. At a sidebar conference, Butler's attorney stated that he was objecting to the removal of Juror 2. He argued that he did not think that there had "been demonstrated a basis to excuse 2." The court stated that they needed "to make the Wheeler motion on the record." The court decided to make the record before the morning recess.

The prosecutor exercised his second peremptory challenge to excuse Juror 1. Again, Butler's attorney objected.

Later, the court took up the *Wheeler* motion outside the presence of the prospective jurors. At that time, Martin's attorney joined in the motion. After some discussion concerning the ethnicity of Juror 2, the court noted that the prosecutor was not required to make any statements or arguments before the court ruled on whether a prima facie case of improper use of peremptory challenges had been made. However, the court afforded the prosecutor the opportunity to comment on the issue.

The prosecutor noted that the panel was a multi-national group with many minorities. He opined that no *Wheeler* motion can be made "when the first persons excluded are challenged by peremptory challenge." He believed that there must be "systematic exclusion of a protected category of people by use of peremptory challenges." Further, he respectfully submitted, "counsel has not made a prima facie case." He asked the court to consider the responses given by the two prospective jurors.

In ruling that no prima facie case had been made, the court stated: "It appears to the Court that the panel remaining in the audience contains at least one and possibly several more African-Americans, and there is currently seated in chair 17 a prospective juror who is African-American. [¶] I'm going to find from all the circumstances of this case as of this time that the moving parties have failed to overcome the presumption that the peremptory challenges were exercised on constitutionally permissible grounds, and has failed to raise a reasonable inference that the challenges were made because of group bias rather than specific bias. [¶] Accordingly, the Wheeler/Batson motion is denied at this time."

In *People v. Hayes* (1999) 21 Cal.4th 1211, the California Supreme Court explained: "In *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 . . . (*Wheeler*), this court held that 'the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution.' Thereafter, in *Batson v. Kentucky* (1986) 476 U.S. 79, 89 . . . [*(Batson)*], the United

States Supreme Court held that the exercise of peremptory challenges solely on the basis of a juror's race, or on the assumption that members of a racial group will not be able to consider the state's case impartially, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. Purposeful discrimination in the selection of the venire violates not only the rights of the prospective jurors, but also those of the criminal defendant who is a member of the same race. More recently, the court held that the defendant need not be of the same race to object to a prosecutor's race-based exercise of peremptory challenges. (*Powers v. Ohio* (1991) 499 U.S. 400, 415-416" (*Id.* at pp. 1283-1284.)

"The rules governing a *Wheeler* challenge are settled. If a defendant believes the prosecution is improperly using peremptory challenges for a discriminatory purpose, he or she must raise a timely objection and make a prima facie showing that jurors are being excluded on the basis of racial or group identity. [Citations.] To establish a prima facie case, the defendant should first make as complete a record as possible. [Citations.] Second, the defendant must establish that the persons excluded are members of a cognizable group. [Citations.] Third, the defendant must show a strong likelihood or reasonable inference that such persons are being challenged because of their group association. [Citations.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 134-135, (*Farnam*); *People v. Johnson* (2003) 30 Cal.4th 1302, 1309.)

"A party may make a showing . . . by, inter alia, pointing out 'that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic -- their membership in the group -- and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir

dire, or indeed to ask them any questions at all.' " (*People v. Crittenden* (1994) 9 Cal.4th 83, 115, quoting *Wheeler, supra*, 22 Cal.3d at pp. 280-281, fn. omitted.)

Only if the trial court finds that the defendant has established a prima facie case does the burden shift to the prosecutor to provide a race-neutral reason for exercising a peremptory challenge. (*Wheeler, supra*, 22 Cal.3d at pp. 281-282; *Batson, supra*, 476 U.S. 79, 97.)

Martin asserts that the prosecutor used his very first two peremptory challenges to remove prospective jurors 18 and 26. Prospective juror 18 was African-American. The ethnicity of prospective juror 26 was not established with certainty, but, according to counsel, she appeared to be an Islander with some African heritage. Furthermore, she associated herself with a community of color. Both jurors were female.

Numbers alone will rarely establish a prima facie case of group bias. (*People v. Rousseau* (1982) 129 Cal.App.3d 526, 536-537 [challenging only two Blacks on the panel "was not a prima facie showing of systematic exclusion"]; *People v. Howard* (1992) 1 Cal.4th 1132, 1154-1155 (*Howard*) ["clearly inadequate" to simply show the only two Blacks were challenged]; *People v. Turner* (1994) 8 Cal.4th 137, 167 (*Turner*) [insufficient to show "that all [four] of the challenged prospective jurors were Black and either had indicated that they could be fair and impartial or in fact favored the prosecution"].) The moving party should make an "effort to set out the other relevant circumstances, such as the prospective jurors' individual characteristics, the nature of the prosecutor's voir dire, or the prospective jurors' answers to questions." (*Howard, supra*, 1 Cal.4th at p. 1154.)

On appeal, we consider whether substantial evidence supports the trial court's determination that the defendant did not make a prima facie showing. (*People v. Alvarez* (1996) 14 Cal.4th 155, 196-197; *People v. Jenkins* (2000) 22 Cal.4th 900, 993.)

"When a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the appellate court reviews the record of voir dire for evidence to support the

trial court's ruling. (*People v. Jenkins, supra*, 22 Cal.4th at p. 993; *People v. Crittenden, supra*, 9 Cal.4th at pp. 116-117[; *People v. Johnson, supra*, 30 Cal.4th at p. 1325].) . . . [I]f we find that the trial court properly determined that no prima facie case was made, we need not review the adequacy of the prosecution's justifications, if any, for the peremptory challenges. [Citation.]" (*Farnam, supra*, 28 Cal.4th at p. 135.)

We must uphold the trial court's finding that Martin did not show a strong likelihood that these two prospective jurors were challenged based solely on their group association. Butler's counsel did not proffer any evidence of bias other than to note that the prosecutor had exercised his first two peremptory challenges to remove Jurors 1 and 2 so that there "were no people of African-American descent left of the original panel." Merely noting that excluded prospective jurors are in cognizable groups is insufficient to establish a prima facie case. (See *People v. Turner* (1994) 8 Cal.4th 137, 167.) As is merely noting that the two excluded jurors had "talked about fairness but have no personal knowledge and this was basically their opportunity for them to see for themselves, go back to the community saying they have seen fairness, it exists. And now we have been denied that by the prosecutor, and there was no valid demonstration, no apparent reason for him to eliminate those two people in the very first two picks other than he's going to eliminate the potential minority composition for this panel."¹⁰

Since defense counsel failed to make a prima facie showing of group bias, we conclude that the trial court did not err in denying the *Wheeler-Batson* motion.

Instructional Errors

Martin contends that the trial court erred by instructing the jury on implied malice in an attempted murder case. Furthermore, Martin maintains that the error is reversible per se.

¹⁰ Both Martin's counsel and Page's counsel joined Butler's counsel in his remarks, but did not comment further.

The jury received the following instructions on the malice aforethought element of the attempted murder count. "Murder is the unlawful killing of a human being with malice aforethought. In order to prove attempted murder, each of the following elements must be proved: [¶] One, a direct but ineffectual act was done by one person towards killing of another human being. [¶] And, two the person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being. . . . The word malice may be either express malice or implied malice. Malice is express when there is manifested an intention unlawfully to kill a human being. [¶] Malice is implied when one, the killing resulted from an intentional act; two the natural consequences of the act are dangerous to human life and three, the act was deliberately performed with the knowledge of the danger to and with conscious disregard for human life. [¶] When it's shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought."

The jury was instructed that it could find the premeditation allegation true only if it found with respect to Martin that the crime attempted was "willful, deliberate, and premeditated. . . . [¶] The word willful means intentional. The word deliberate means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. [¶] The word premeditated means considered beforehand. If you find the attempted murder was preceded or accompanied by clear, deliberate intent to kill which was the result of deliberation and premeditation so that it must have been formed upon preexisting reflection, not under a sudden heat of passion or other condition precluding the idea of deliberation, it is attempt to commit willful, deliberate, and premeditated murder." "To constitute willful, deliberate, and premeditated attempted murder, the would be slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having

in mind the consequences, decides to kill and makes a direct but ineffectual act to kill a human being."

Finally, the jury was instructed on the lesser crime of attempted voluntary manslaughter that "every person who unlawfully attempts to kill another person being [*sic*], another person, without malice aforethought but either with an intent to kill or in conscious disregard for human life, is guilty of attempted voluntary manslaughter in violation of Penal Code sections 664 slash 192 (a). [¶] There is no malice aforethought if the killing occurred in the actual but unreasonable belief in the necessity to defend one's self against the imminent peril to life or great bodily injury. [¶] The words conscious disregard for life as used in this instruction means that the killing or attempted killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life. [¶] In order to prove this crime, each of the following elements must be proved: [¶] One, an attempt was made to kill a human being. [¶] Two, the attempt to kill was unlawful; and three, the perpetrator of the attempt either intended to kill the alleged victim or acted in conscious disregard for life."

The instructions went on to state that an attempt to commit a crime consists of two elements, "a specific intent to commit the crime and a direct but ineffectual act done towards its commission." The jury was instructed that "acts of a person who intends to commit a crime will constitute an attempt when the acts clearly indicate a certain unambiguous intent to commit the specific crime. Those acts must be an immediate step in the present execution of the criminal design"

Relying on *People v. Lee* (1978) 43 Cal.3d 666 (*Lee*), Martin argues that the trial court committed error when it instructed the jury upon implied malice in an attempted

murder case.¹¹ *Lee* was an attempted murder prosecution in which the trial court instructed the jury that if "the attempted killing resulted from an intentional act done with implied malice, 'it is not necessary to establish that the defendant intended that his act would result in . . . death. . . .'" (*Id.* at p. 671.) The California Supreme Court held that that particular instruction was erroneous but harmless beyond a reasonable doubt. (*Id.* at p. 677.)

"It is now well established that a specific intent to kill is a requisite element of attempted murder, and that mere implied malice is an insufficient basis on which to sustain such a charge. Accordingly, implied malice instructions should never be given in relation to an attempted murder charge. [Citations.]" (*People v. Lee, supra*, 43 Cal.3d at p. 670.)

The case before us is similar to the situation addressed by the California Supreme Court in *People v. Carpenter* (1997) 15 Cal.4th 312 (*Carpenter*). In *Carpenter*, the trial court's attempted murder instructions had "referred to the elements of murder, which included implied malice, and said that those 'elements apply when the crime is attempted.'" (*Id.* at p. 391.) However, the trial court had also instructed the jury that attempted murder required " 'the specific intent to commit murder.' " (*Id.* at p. 391.) The California Supreme Court concluded that the trial court had not "misinstructed" the jury. (*Id.* at p. 391.)

The same is true here. The trial court's attempted murder instructions unambiguously required the jury to find that "the person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being." These instructions posed even less danger of confusing the jury than the

¹¹ Recognizing that *Lee* held to the contrary, Martin asserts that the error requires reversal per se based on controlling authority not adequately addressed in *Lee*. We must reject Martin's assertion that reversal per se applies. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

instructions given in *Carpenter* and found by the California Supreme Court to be non-erroneous.

Moreover, the jury's finding on the premeditation allegation precludes a finding of prejudice. The true finding on the allegation required a finding that defendant had harbored a "clear, deliberate intent to kill." Even if the jury had been misled by the court's mention of implied malice in the attempted murder instructions, the instructions on the allegation clearly required a finding that defendant had harbored a specific intent to kill. Any error could not have prejudiced defendant.

CALJIC No. 8.72

Martin argues that the trial court erred in failing to give a modified version of CALJIC No. 8.72 specifying that the jury must acquit of murder if it had a reasonable doubt whether the offense committed was murder or manslaughter.

It appears that Martin's counsel requested that a modified version of CALJIC 8.72 be given to the jury. The instruction as modified stated: "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of the doubt and find it to be manslaughter rather than murder."¹²

Martin asserts that failure to give this instruction denied him due process of law. He submits that the standard of prejudice governing errors of federal constitutional dimension should apply.

The People point out that the jury was instructed with CALJIC No. 17.10 as follows: "If you're not satisfied beyond a reasonable doubt that a defendant is guilty of a crime charged, you may nevertheless convict him or her of any lesser crime, if you are

¹² The record contains a copy of CALJIC No. 8.72 as offered by Martin. It is marked as withdrawn. There is no discussion in the record that would indicate why the instruction was withdrawn.

convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. . . .

[¶] The crime of attempted voluntary manslaughter in violation of Penal Code section 664 dash 192 (a) is the lesser to the crime charged in count five [attempted murder]."

People v. Dewberry (1959) 51 Cal.2d 548 stated "that when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*Id.* at p. 555.) This error was prejudicial when the court instructed the jury to return a verdict of second degree murder if there was reasonable doubt about first degree murder, but the jury was not instructed to apply the same rule to second degree murder and manslaughter. (*Id.* at pp. 557.)

People v. Aikin (1971) 19 Cal.App.3d 685 (*Aikin*), disapproved on other grounds in *People v. Lines* (1975) 13 Cal.3d 500, 512-514, determined that a *Dewberry* instruction should be given sua sponte when a jury must decide between an offense and a lesser included offense. (*Id.* at pp. 703-704; cf. *People v. Crone* (1997) 54 Cal.App.4th 71, 76 [*Dewberry* error where CALJIC No. 17.10 not given].)

In *People v. Reeves* (1981) 123 Cal.App.3d 65 (*Reeves*), disapproved on another ground in *People v. Sumstine* (1984) 36 Cal.3d 909, 919, on which Martin relies, the First District Court of Appeal, Division One followed *Aikin* and also concluded that CALJIC No. 17.10 does not sufficiently inform a jury how to resolve a reasonable doubt between two offenses. (*Id.* at p. 70.) The court concluded, however, that the error was harmless under *People v. Watson, supra*, 46 Cal.2d 818, because the trial court's instructions on reasonable doubt, including CALJIC 17.10, had adequately informed the jury that it had "the option of convicting appellant of only the lesser offense if it entertained such a doubt." (*Reeves, supra*, 123 Cal.App.3d at p. 70.)

Later cases, on which the People rely, have concluded that CALJIC No. 17.10 sufficiently conforms to the *Dewberry* mandate. In *People v. St. Germain* (1982) 138

Cal.App.3d 507, the First District Court of Appeal, Division Four, disagreed with *Reeves* (*id.* at p. 522, fn. 9) and concluded that "[i]n giving CALJIC No. 17.10, the trial judge adhered precisely to *Dewberry* and section 1097 which that decision took pains to interpret." (*Id.* at p. 521.) The court upheld the trial court's refusal to give a *Dewberry* instruction in addition to CALJIC No. 17.10. (*Id.* at p. 522.)

In *People v. Gonzalez* (1983) 141 Cal.App.3d 786, disapproved on other grounds in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330, the Second District Court of Appeal, Division Five, held that "CALJIC Nos. 17.10 and 17.11 are tailor-made to express the *Dewberry* concept." (*Id.* at p. 793.) The *Gonzalez* court expressly disagreed with "anything in *Reeves* which indicates that CALJIC No. 17.10 by itself was in any way insufficient." (*Id.* at p. 794, fn. 8.)

We agree with the *St. Germain* court that "CALJIC No. 17.10 enunciates what *Reeves* finds that it does not: namely, that it instructs the jury that if it finds the prosecution has not sustained its burden of proving each element of the greater of the offenses beyond a reasonable doubt, but finds that the prosecution has sustained its burden of proving the elements of the lesser offense beyond a reasonable doubt, then it must return a guilty verdict of the lesser offense only. In light of our conclusion, the additional instruction mandated by *Reeves* is redundant, and we decline to adhere to that decision." (*People v. St. Germain, supra*, 138 Cal.App.3d at p. 522, fn. 9.) We therefore conclude that Martin's claim of *Dewberry* error is meritless.

In any event, assuming *arguendo* *Dewberry* error occurred, the error was harmless in this case. We agree with those cases which have held that such error requires reversal only if it is reasonably probable a more favorable verdict would have been obtained had the proper instruction been given (see e.g., *Dewberry, supra*, 51 Cal.2d at p. 558; *People v. Reeves, supra*, 123 Cal.App.3d at p. 70; *People v. Crone, supra*, 54 Cal.App.4th 71, 78-79.)

Here, it is not reasonably probable defendant would have received more favorable verdicts had he received the instructions in question given the facts contained in the record. The prosecution alleged that the attempted murder was deliberate and premeditated. In instructing on this allegation, the trial court gave a *Dewberry*-type instruction: "The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it's true, you must find it to be not true." The jury found the allegation true. Given that the jury unanimously believed that Martin deliberated and premeditated the attempted murder, it is not conceivable that the jury had any reasonable doubt that the crime was attempted murder.

Moreover, the jury was instructed that it could not find Martin guilty of an offense unless it unanimously found that every element of that offense was proved beyond a reasonable doubt. (CALJIC No. 2.61, defendant can rely on the state of the evidence and failure of prosecutor to prove beyond a reasonable doubt every essential element of the charge against him; CALJIC No. 2.90, People have burden of proving guilt beyond a reasonable doubt; CALJIC No. 8.66, elements of attempted murder must be proved.)

Finally, Martin fired six shots at Wallace. Based on a stray, unfired .40-caliber bullet found by a neighbor close to the intersection where Wallace's car stopped at the end of the chase, Martin's counsel, during closing argument, implied that Wallace possibly had a gun. She argued that since Wallace was "relentlessly" chasing "two guys, minimum of two guns," either Wallace "does have a gun to be able to meet force with force or is wearing a bullet proof vest." Wallace denied that he had a gun. His girlfriend, who had lived with him for four years, stated that he did not own a gun. Martin's self-defense argument was speculative at best.

Accordingly, we conclude that assuming there was *Dewberry* error, that error was harmless.

Next, Martin contends that the trial court erred in failing to give sua sponte an instruction like CALJIC No. 5.15¹³ specifying that it was the prosecution's burden of proof to demonstrate the unlawfulness of the attempted homicide. He asserts that the error deprived him of due process. The People disagree that a trial court has a sua sponte duty to give a modified version of CALJIC No. 5.15.

Martin's defense attorney argued that Wallace had either a gun, or a bulletproof vest. She asserted that Wallace had been to gun shows and "in all likelihood" Wallace had a gun. In addition, he did what any drug dealer does when he is "ripped off" — went after the people. Counsel explained that self-defense "kicks in" if you have a reasonable belief in self-defense. She argued that the people in the green car had a reason to believe that Wallace was armed.

CALJIC No. 5.15 specifically addresses the burden of proof on justification in homicide offenses. It is a "pinpoint" instruction, which at least two courts have held is not error for a trial court to omit in the absence of a defense request. (*People v. Sandoval* (1970) 9 Cal.App.3d 885; *People v. Adrain* (1982) 135 Cal.App.3d 335, 336, 340.)

Martin asserts, however, that under Evidence Code section 502, the court was required to give an instruction similar to CALJIC No. 5.15 on the burden of proving the unlawfulness of the attempted murder.

"A trial court must instruct the jury on the allocation and weight of the burden of proof (Evid. Code, § 502; *People v. Simon* [1995] 9 Cal 4th [493,] 501 [citing Evid. Code, § 502]; *People v. Figueroa* [1986] 41 Cal.3d [714,] 721 [same]), and, of course, must do so correctly. It must give such an instruction even in the absence of a request

¹³ CALJIC No. 5.15 reads as follows: "Upon a trial of a charge of murder, a killing is lawful, if it was [justifiable] [excusable]. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful, that is, not [justifiable] [excusable]. If you have a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty."

(see *People v. Simon*, *supra*, 9 Cal.4th at p. 501), inasmuch as the allocation and weight of the burden of proof are issues that 'are closely and openly connected with the facts before the court, and . . . are necessary for the jury's understanding of the case.'

[Citation.]" (*People v. Mower*, *supra*, 28 Cal.4th 457, 483-484.)

Martin argues that the unlawfulness of the killing "goes squarely to the statutory elements of the crime, not just a matter collateral to guilt or innocence. Moreover, it is doubtful at best jurors would lift a couple of oblique references to unlawfulness in the attempted murder instruction and relate them both to the self-defense instructions and the general burden of proof instructions. If anything, jurors would conclude [he] had to prove this 'defense' if he wanted to get off completely on a charge as serious as attempted murder." We disagree.

The trial court instructed the jury on self-defense, defense of others and the unreasonable belief in the necessity to defend. Furthermore, the court instructed the jury on reasonable doubt pursuant to CALJIC No. 2.90. That instruction informed the jury that the prosecutor had the burden of proving guilt beyond a reasonable doubt. Pursuant to CALJIC No. 8.66 the jury was instructed that the attempted murder required the specific intent to *unlawfully* kill another human being. Moreover, pursuant to CALJIC No. 8.50 the jury was instructed that to establish that an attempted killing is murder and not attempted manslaughter, "the *burden is on the People to prove beyond a reasonable doubt* each of the elements of attempted murder *and* that the act which constituted the attempted murder was not done in [the] actual, even though unreasonable belief in the necessity to defend against the imminent peril to life or great bodily injury." (Italics added.)

Thus, the jury was instructed that the prosecution had the burden of proving beyond a reasonable doubt every element of the charge of attempted murder against Martin. Included therein was the burden of proving that the attempted murder was

unlawful. Accordingly, we conclude that the jury was adequately instructed on the allocation and weight of the burden of proof sufficient to fulfill the mandate of Evidence Code section 502.

The Trial Court's Failure to Rule on the Sufficiency of the Evidence

After trial, Martin filed a motion entitled "STATEMENT IN MITIGATION and REQUEST FOR JUDICIAL REDUCTION OF COUNT FIVE FROM ATTEMPTED FIRST DEGREE TO ATTEMPTED SECOND DEGREE MURDER." The request stated two grounds for reduction: sufficiency of the evidence, and cruel and unusual punishment arising from the imposition of a life term on a 21-year-old with no significant prior record. The sufficiency of the evidence argument revolved around the identity of the person that had shot at Wallace.

The motion cited *People v. Dillon* (1983) 34 Cal.3d 441 and *People v. Sheran* (1957) 49 Cal.2d 101, as authority for the trial court to reduce Martin's conviction from attempted first degree to attempted second degree murder.

On September 13, 2002, Martin appeared before the court for sentencing. After the court asked Martin's counsel if there was any legal cause why sentence should not be pronounced, defense counsel asked the court to rule on her motion.

The prosecutor responded orally. First, he asserted that "in effect . . . counsel was asking the Court to set aside the finding the jury made with respect to" premeditation and deliberation. Next, he argued that there was sufficient evidence of premeditation and deliberation. Finally, he argued that a life term was not excessive under the circumstances. Defense counsel submitted the matter.

In denying the motion, the court noted that Martin "ha[d] asked the Court to reduce the attempted murder conviction from first degree to second degree on the grounds that the punishment in this case violates the Constitution because it's cruel or unusual based upon a grossly disproportionate sentence." The court went on to give a detailed analysis of the cruel and unusual punishment issue. The court looked at the

nature of the offense in the abstract and the degree of danger it presented to society; the circumstances of the offense in this case and the degree of danger presented to society; and the nature of the defendant and the degree of danger he presented to society.

Finally, the court concluded: "I'm going to find based on all these considerations that the statutory punishment for attempted first degree murder as applied in this case is not such a disproportional sentence or punishment as to violate article I, section 17 of the California Constitution or 8th Amendment to the U.S. Constitution. Therefore, the Court will deny the motion to reduce the offense to attempted second degree murder."

Martin argues that although it was not mentioned in the motion, it is implicit that his position was that there was insufficient evidence of premeditation and deliberation. Furthermore, the prosecutor's argument addressed the sufficiency of the evidence argument in terms of premeditation and deliberation.

Martin argues that the court's failure to address the sufficiency of the evidence claim in these terms was error. This error deprived him of "due process of law by denying him fundamental fairness in state criminal proceedings and, in particular, by arbitrarily (here, inadvertently) denying him a significant independent exercise of discretion as to the sufficiency of evidence of the greater offense provided for under state law."

Relying on *People v. Harris* (1970) 4 Cal.App.3d 921, 925, *People v. Jaramillo* (1962) 208 Cal.App.2d 620, 627, *People v. Robarge* (1953) 41 Cal.2d 628, 634-635, and *People v. Sarazzawski* (1945) 27 Cal.2d 7, 16, Martin argues that failure to conduct an independent re-weighing of the evidence requires that the case be remanded to the trial court.

In each of the cases cited by Martin, the courts below had been presented with a motion for a new trial. (*People v. Harris, supra*, 4 Cal.App.3d at p. 923 [defendant orally made a motion for a new trial]; *People v. Jaramillo, supra*, 208 Cal.App.2d at p. 627 [a six-page motion for a new trial, with citation to authorities, signed by appellant was filed

with the clerk]; *People v. Robarge, supra*, 41 Cal.2d at p. 633 [defendant made a motion for a new trial], and *People v. Sarazzawski, supra*, 27 Cal.2d at p. 16 [defendant made motion for a new trial after the jury was discharged].)

Initially, we note that Martin's motion was not a motion for a new trial. However, even if we were to assume that it was intended as such, we would not find error in the way the court addressed the issue.

A reasonable construction of section 1181 would imply that a defendant waives his right to a new trial, or as in this case, reduction of the degree of the crime, upon all grounds included within the provisions of that section unless he specifies the grounds upon which he relies in his application. (*People v. Skoff* (1933) 131 Cal.App. 235, 240.) It follows that since Martin failed to move for a reduction of the degree of the crime on the ground of insufficiency of the evidence of premeditation and deliberation that he cannot expect the court to so consider the issue.

Here, the trial court read Martin's motion, heard argument on the issue, and gave a detailed ruling. The detailed ruling directly addressed the points raised in Martin's motion. Martin's motion argued that the evidence was insufficient on the issue of the identity of the shooter. By concluding that the "defendant [Martin] fired a gun a number of times at the victim's vehicle" it is apparent that the court concluded that there was sufficient evidence that Martin was the shooter. Furthermore, the court gave detailed reasons why the conviction should not be reduced from attempted first-degree murder to attempted second-degree murder. Notwithstanding the prosecutor's assertion that the motion was in effect asking the court to reduce the conviction based on insufficient evidence of premeditation and deliberation, the court addressed Martin's motion as written.

Martin's attempt to characterize the motion as something other than as it was written is not well taken.

Cruel or Unusual Punishment

Martin was sentenced to a prison term of life for the attempted premeditated murder charge; 20 years for personal discharge of a firearm in the commission of that offense; six years on count one; and 10 years for personal use of a firearm in the commission of that offense.

Martin contends that the imposition of a "true life term" constitutes cruel and unusual punishment in violation of the California Constitution and United States Constitution.

He argues that at the time of the offense he was 19 years old, 20 years old at the time of sentencing. Furthermore, in "the words of the probation department, '[i]n the defendant's behalf, he does not have an egregious or lengthy criminal history and had not [sic] prior history of violent behavior. Further, the defendant was particularly young when he committed the present offense.' "

Moreover, he asserts that he fired a weapon upon provocation during a robbery. He killed no one and only fired after repeatedly attempting to avoid confrontation, despite opportunities to fire earlier. There was reason to believe that Wallace had a gun and may have fired a weapon.

The Eighth Amendment of the federal Constitution, applicable to the states through the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const., 8th Amend.) Likewise, article 1, section 17, of the California Constitution declares "[c]ruel or unusual punishment may not be inflicted or excessive fines imposed."¹⁴

¹⁴ Inasmuch as the California Constitution's ban against cruel and unusual punishment arguably affords defendant broader protection than the United States Constitution, we analyze Martin's claim only under the California standard. A punishment that satisfies this standard necessarily also satisfies the federal standard. (Cf. *People v. Anderson* (1972) 6 Cal.3d 628.) California case law recognizes that the federal prohibition against cruel and unusual punishment offers no greater protections than the

"The selection of a proper penalty for a criminal offense is a legislative function involving an appraisal of the evils to be corrected, the weighing of practical alternatives, and consideration of relevant policy factors and responsiveness to the public will. (*In re Lynch* (1972) 8 Cal.3d 410, 423.)

"It is well settled a statutory punishment may violate the constitutional prohibition against cruel and unusual punishment not only if it is inflicted by a cruel or unusual method, but also if it is grossly disproportionate to the offense for which it is imposed. [Citation.] In the case of *In re Lynch* (1972) 8 Cal.3d 410 [*Lynch*], the Supreme Court held a punishment may violate the California constitutional prohibition 'if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*Id.* at p. 424.)" (*People v. Thompson* (1994) 24 Cal.App.4th 299, 304.)

In *People v. Dillon, supra*, 34 Cal.3d 441 (*Dillon*), the California Supreme Court expanded on its analysis of crimes and proportional punishments. The court explained that the trial court must consider the specific facts of the crime in question, as compared with only considering the crime in the abstract. (*Id.* at p. 479.) In addition, the court must consider the nature of the offender and ask whether the punishment is grossly disproportionate to the defendant's culpability, taking into account factors such as age, prior criminality, personal characteristics, and state of mind. (*Ibid.*)

In *Dillon*, our Supreme Court applied the *Lynch* reasoning to determine whether, under the circumstances, the defendant's conviction for murder was so disproportionate to the actual crime that it shocked the conscience and offended fundamental notions of human dignity. (*Dillon, supra*, 34 Cal. 3d at p. 478.) The defendant in *Dillon* was an immature 17-year old who, along with six other boys, planned to steal marijuana growing

analogous state constitutional provision. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.)

in a mountain field. Several of the boys brought along firearms, including the defendant, who had a .22 caliber semi-automatic rifle. When the defendant, who was stationed near the edge of the field, heard shots, he became alarmed. The victim, who was apparently guarding the marijuana, approached the defendant carrying a shotgun. When he confronted the defendant, the defendant fired his gun several times out of fear and panic. The victim died days later. While the jury found the defendant guilty of felony murder, they expressed reservation about the harshness of the felony-murder rule and asked whether they could return a second degree murder verdict even though the killing occurred during an attempted robbery. "In its proportionality analysis, the [trial] court focused first on the youth's own explanation of the episode, which revealed the evolution of his state of mind from 'youthful bravado, to uneasiness, to fear for his life, to panic.' The court emphasized that although a defendant's explanation is often discounted as self-serving, both the trial judge and the jury gave defendant Dillon's testimony 'large credence and substantial weight.' (*Id.*, at p. 482.) The court also emphasized the uncontradicted expert testimony of a clinical psychologist that defendant was an unusually immature youth, and pointed out that he had no prior record. In addition, the court noted that both trial judge and jury believed that life imprisonment as a first degree murderer was excessive in relation to defendant's true culpability. Finally, the court compared the sentence with the 'petty chastisements' handed out to the other participants in the raid, several of whom were also armed with shotguns, and all of whom were at least aiders and abettors in the killing. None of these individuals were [*sic*] convicted of any degree of homicide, and none was sentenced to any state prison term. (*Id.*, at p. 488.)" (*People v. Kelly* (1986) 183 Cal.App.3d 1235, 1245.)

Since *Dillon*, "[f]indings of disproportionality have occurred with exquisite rarity in the case law. Because it is the Legislature which determines the appropriate penalty for criminal offenses, defendant must overcome a 'considerable burden' in convincing us

his sentence was disproportionate to his level of culpability. [Citation.]" (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.)

Martin has failed to show his sentence was grossly disproportionate to the offenses as defined, the offenses as committed, or to his individual culpability.

Martin makes no argument that the sentence is grossly disproportionate to the offenses as defined. He does argue, however, that the sentence is disproportionate to the offenses as committed and to his individual culpability.

Martin asserts that at the time of the robbery and shooting he was 19 years old. He had no prior juvenile record and was no more the prototype of a hardened criminal than Mr. Dillon. Furthermore, like Dillon he fired a weapon upon provocation during a robbery. Unlike Dillon, he killed no one. He fired only after repeatedly attempting to avoid confrontation.

Moreover, his codefendant Butler "received a far lesser determinate term of 17 years, even though he had a prior prison term and, like Dillon's confederates, also participated in an armed robbery."

Finally, Martin argues that like Mr. Dillon, he did not plan to shoot anyone. Further, the term imposed on him is equivalent to the term imposed for far more serious and aggravated cases of premeditated murder.

We are not persuaded by Martin's arguments. While young,¹⁵ Martin was not as young as the unusually immature minor in *Dillon*. Furthermore, the evidence showed a great deal of planning and contemplation on the part of Martin. He met with Wallace's good friend Ryan three days before the offenses and asked questions about Wallace. Martin and his codefendant's drove from Richmond to San Jose to carry out the robbery. Martin put the guns in Sousa's trunk before they left Richmond. Further, Martin forced his way into Wallace's house brandishing a gun, which he aimed at two very young girls.

¹⁵ Martin was 16 days shy of his 20th birthday at the time of the offenses.

Martin took part in a serious home invasion robbery that created a high degree of danger to the victims that were present in the house. Further, the circumstances of the shooting created a high degree of danger to people in the surrounding neighborhood. When Martin fired at Wallace, he did so in a residential area where other innocent people could have been hit.

Accordingly, after considering the totality of the circumstances, we conclude that Martin's punishment does not shock the conscience of this court and offend fundamental notions of human dignity.

Cumulative Error

Martin asserts that the cumulative effect of the errors he has alleged deprived him of due process of law and a fair trial.

Since we have determined that there was no error entitling him to relief, we must reject his assertion of cumulative error.

Joinder in Butler's Arguments

To the extent the arguments apply to him, Martin joins and incorporates by reference all arguments raised by Butler.

We find that none of the arguments raised by Butler apply to Martin.

Disposition

With regard to Butler, the judgment is reversed. With regard to Martin, the judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.